Supreme Court, U.S.
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No. 93-938

In the Supreme Court of the United States

OCTOBER TERM, 1993

ALEX DANDY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the district judge did not abuse his discretion in declining to recuse himself because of a casual relationship with a government witness.

2. Whether the court of appeals erred in holding that petitioner waived his challenge to the sufficiency of the evidence supporting two of the counts of conviction.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a), as amended (Pet. App. 28a-33a), is reported at 998 F.2d 1344.

JURISDICTION

The judgment of the court of appeals was initially entered on June 7, 1993. The court of appeals filed an amended opinion on August 11, 1993. A petition for rehearing was denied on September 15, 1993. Pet. App. 41a. The petition for a writ of certiorari was filed on December 14, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted on three counts of tax evasion, in violation of 26 U.S.C. 7201; three counts of willfully filing false amended tax returns, in violation of 26 U.S.C. 7206(1); one count of obstructing an IRS audit, in violation of 18 U.S.C. 1505; two counts of mail fraud, in violation of 18 U.S.C. 1341; and one count of bankruptcy fraud, in violation of 18 U.S.C. 152.[1] He was sentenced to 23 years' imprisonment. Pet. App. 6a. The court of appeals affirmed petitioner's convictions and sentence, but remanded for entry of a corrected judgment.

1. Petitioner assumed control over Hamady Brothers Food Markets, Inc. (Hamady) in 1981. McDonald Dairy, which was Hamady's dairy supplier, paid rebates to its customers based on the volume of their purchases. From 1982 to 1984, petitioner diverted more than $1 million in rebates from McDonald Dairy to his own account, but failed to report any of that money on his income tax returns for those years. Pet. App. 2a-3a.

Between 1982 and 1986, petitioner also received hundreds of thousands of dollars of additional unreported income from McDonald Dairy, from other suppliers, and from Hamady itself; more than $157,000 of those payments were disguised as donations to a "[c]haritable [f]und." Pet. App. 3a-4a. When the Internal Revenue Service issued summonses to McDonald Dairy in 1985 for records of rebate moneys that McDonald Dairy had paid, petitioner attempted to cover up the diversions by, among other things, directing McDonald Dairy to withhold all checks that represented direct or indirect payments to him. *Id.* at 4a.

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[1] One additional count of mail fraud was dismissed by the district court. Pet. App. 6a.

In March 1986, petitioner gained control of Nu-Trax, Inc. He then greatly increased Nu-Trax's purchases from certain suppliers. Under petitioner's direction, those suppliers in turn inflated the prices of their products in order to pay sham "consulting fees" to entities owned by petitioner and a sham "salary" to petitioner's son-in-law. Pet. App. 4a-5a.[2] Petitioner also diverted many of Nu-Trax's assets to himself and directed it to pay one of his wholly owned entities more than $275,000 in sham "consulting fees." When it became clear that Nu-Trax was destined for bankruptcy, petitioner forced Nu-Trax to buy a worthless stock option from him for more than $7 million in cash and real estate. He then prevented Nu-Trax from declaring bankruptcy during the one-year period within which the sale could have been set aside as an avoidable transfer under bankruptcy law. *Id.* at 5a.

2. Petitioner was originally indicted on December 14, 1990, and a superseding indictment was returned on April 12, 1991. Pet. App. 6a. Counts 1 and 2 of the original indictment charged petitioner with attempting to evade his 1982 and 1983 taxes on the dates he filed false tax returns for those years—June 13, 1983, and July 3, 1984, respectively. Counts 1 and 2 of the superseding indictment, however, alleged that petitioner's acts of evasion continued through November 1985. *Id.* at 21a.

At the close of the government's case, defense counsel made a motion under Fed. R. Crim. P. 29 for a judgment of acquittal. Pet. App. 28a. With respect to Counts 1 and 2, however, defense counsel stated that "[s]ubstantively we have no Rule 29 motion with regard to Counts 1 [and 2]." *Id.* at 29a. Defense counsel did reassert petitioner's

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[2] Petitioner omitted those kickbacks from his 1986 income tax return. Pet. App. 5a-6a.

pretrial motion to dismiss those counts based upon the statute of limitations, and he also argued that the government had failed to prove Count 6 of the indictment (which alleged petitioner's November 1985 obstruction of an IRS audit) and as a result had failed to establish an affirmative act of evasion within the six-year limitations period applicable to Counts 1 and 2. *Id.* at 29a-30a, 53a-54a. The district court rejected petitioner's challenge to Counts 1, 2, and 6. *Id.* at 56a.

At the close of all the evidence, defense counsel made a "general renewal" of the Rule 29 motion, and once again he argued that the evidence on Count 6 was insufficient. Pet. App. 30a (emphasis omitted). The district court denied petitioner's motion. *Ibid.*

3. Count 8 of the superseding indictment charged petitioner with defrauding Nu-Trax by obtaining money that should have been paid to it. As part of the scheme to defraud, petitioner was alleged to have caused Nu-Trax to purchase dairy products from London's Farm Dairy, Inc. (London's Dairy), in return for kickbacks paid to petitioner. C.A. App. 51-53; see also Pet. App. 23a-25a.

Several months prior to trial, the district judge informed the parties that he was acquainted with Douglas Mowat, the president of London's Dairy, who was expected to be a witness. The judge explained that he had a casual acquaintance with Mowat, and that Mowat and "others from the London organization" may have contributed $10 or $20 apiece to his campaign when the judge served as an elected official in St. Clair County, Michigan. Pet. App. 6a-7a, 44a. The judge added, however, that he had not seen Mowat in over two years, that he had never been to Mowat's home, that Mowat had never been to his home, and that he and Mowat had never discussed London's Dairy or the facts of this case. *Ibid.* The judge also disclosed his acquaintance with various members of

the London family, including Glen London, who lived across the street from the judge when the judge was in college and law school, and Terry London, a Michigan state representative. To the judge's knowledge, however, Glen London was no longer associated with London's Dairy, and Terry London was not associated with the corporation in any way. *Id.* at 7a, 43a.

Petitioner moved to recuse the judge under 28 U.S.C. 455(a). The judge denied the motion. Pet. App. 34a-38a.[3] Mowat later testified at petitioner's trial.

4. The court of appeals affirmed in pertinent part. Pet. App. 1a-33a. The court first rejected petitioner's claim that the district court erred in denying petitioner's motion to recuse. *Id.* at 6a-9a. The court explained that recusal is required by 28 U.S.C. 455(a) when "a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* at 7a-8a (quoting *United States* v. *Nelson*, 922 F.2d 311, 319 (6th Cir. 1990), cert. denied, 499 U.S. 981 (1991)). Finding that the district judge was merely an acquaintance of Mowat and the London family rather than a close personal friend, the court concluded that the judge's "relationship with the London family and Mowat was not of a sufficiently intimate degree to induce a reasonable person with knowl-

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[3] Among other things, the judge noted that he would not be called upon to make credibility determinations because the case was being tried to a jury, and that the alleged victim of the fraud was Nu-Trax, not London's Dairy or Mowat. Pet. App. 36a-37a. The judge also noted that several hundred people had contributed to his reelection campaign for county prosecutor. *Id.* at 35a.

edge of all the facts to conclude that [the judge's] impartiality could be reasonably questioned." Pet. App. 9a.[4]

The court of appeals also rejected petitioner's claim that the evidence was insufficient to sustain his convictions on Counts 1 and 2. Pet. App. 21a-23a, 28a-33a. The court held that the statute of limitations did not begin to run on Counts 1 and 2 until petitioner's final acts of evasion in November 1985. *Id.* at 21a-23a. The court further held that petitioner had waived any broader challenge to the sufficiency of the evidence on Counts 1 and 2. The court explained that petitioner's "Rule 29" motion did not actually challenge the general sufficiency of the evidence with respect to those counts and that his assertion of specific, statute-of-limitations grounds for the motion meant that he had waived all other grounds. *Id.* at 28a-33a.[5]

ARGUMENT

1. Petitioner contends (Pet. 13-17) that the court of appeals improperly disregarded the standards applicable to disqualification motions when it concluded that the district judge was not required to recuse himself in this case. The court of appeals applied the correct legal

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[4] The court of appeals also relied on the facts that Mowat was merely one of many government witnesses, that the judge did not have to determine Mowat's credibility, that Mowat had no personal stake in the outcome of the case, and that London's Dairy was not a victim of petitioner's offenses because it had actually received more business as a result of its payments to petitioner. Pet. App. 8a-9a.

[5] The court of appeals rejected all but one of petitioner's remaining claims of reversible error. Pet. App. 9a-26a. The court agreed with petitioner and the government that the district court had lacked jurisdiction to issue a "corrected judgment," and accordingly vacated that judgment and remanded to allow the district court to clarify petitioner's parole eligibility date. *Id.* at 27a.

standard in reaching that conclusion, however, and further review is therefore not warranted.

The court of appeals correctly recognized (Pet. App. 7a-8a) that the standard for recusal is an objective one, and that a district judge "must recuse himself where 'a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned.'" Accord 28 U.S.C. 455(a) (judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned"); *United States* v. *Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). The court of appeals then made a correct, fact-bound determination (Pet. App. 8a-9a) that a reasonable observer would not question the judge's impartiality in this case, given (1) the casual and insignificant nature of the judge's relationship with Mowat and the London family, (2) the fact that Mowat was merely one of many government witnesses and had no personal stake in the outcome of the case, and (3) the fact that London's Dairy had not been injured by petitioner's crimes. See *United States* v. *Lovaglia*, 954 F.2d at 815-817; *Clay* v. *Doherty*, 608 F. Supp. 295, 300 (N.D. Ill. 1985).

Contrary to petitioner's assertions, the legal standard applied by the court of appeals is entirely consistent with the standard set forth in this Court's decision in *Liljeberg* v. *Health Services Acquisition Corp.*, 486 U.S. 847 (1988). See *id.* at 858 n.7 (Section 455(a) adopts an objective test for recusal); *id.* at 861 (Section 455(a) violated when "an objective observer would have questioned [the judge's] impartiality"). The court of appeals properly examined the facts from the perspective of an objective, reasonable observer and concluded that there was no

basis for questioning the district judge's impartiality. *Liljeberg* requires no more.[6]

Petitioner also errs in asserting (Pet. 16) that the Fifth Circuit disqualified a district judge under "similar circumstances" in *In re Faulkner*, 856 F.2d 716 (1988). In *Faulkner*, the Fifth Circuit disqualified a judge under 28 U.S.C. 455(a) after finding that "a relative with a close relationship to the judge" was an "important participant in key transactions," that the relative might well testify at trial, and, "[p]erhaps even more importantly, that [the] relative ha[d] communicated to the judge * * * material facts and her opinions and attitudes regarding those facts." 856 F.2d at 721 & n.8.

In this case, by contrast, the judge never discussed the facts of the case with Mowat. Pet. App. 44a. Moreover, the judge's relationship with Mowat and the London family was only casual and inconsequential, whereas in *Faulkner* the potential witness was the district judge's first cousin and the judge described their relationship as "more like that of 'brother and sister.'" 856 F.2d at 718. Thus, *Faulkner* is plainly distinguishable from the facts of this case.

Finally, there is no merit to petitioner's claim (Pet. 16) that the 23-year sentence of imprisonment imposed on petitioner created an appearance of partiality. Given the inconsequential nature of the judge's relationship with Mowat and the London family and the judge's care-

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[6] Petitioner relies (Pet. 14) on the *Liljeberg* Court's conclusion (486 U.S. at 859) that "[s]cienter is not an element of a violation of § 455(a)." That holding provides no support to petitioner, however. The court of appeals did not examine the subjective knowledge and state of mind of the district judge in concluding that recusal was not required; rather, the court found that the facts were insufficient to cause an objective observer to doubt the judge's impartiality. Pet. App. 9a.

ful, detailed, and compelling explanation for the lengthy sentence imposed on petitioner,[7] no reasonable observer would have questioned the judge's impartiality based on the sentence imposed.[8] Accordingly, further review of this issue is not warranted.[9]

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[7] The judge explained that the sentence was appropriate in view of the "extraordinary seriousness" of petitioner's crimes, which could be measured in terms of the millions of dollars petitioner had misapplied, stolen, and failed to report, and by the hundreds, if not thousands, of working people whose lives were "thrown into turmoil and ruin" by petitioner's crimes. C.A. App. 765. The court also pointed to petitioner's prior criminal record, his willingness to "employ virtually any ruse, speak virtually any lie and deliver virtually any threat needed to continue the flow of cash into his pockets," and the fact that petitioner had "intimidated and financially seduced" merchants and even a priest. *Id.* at 763-764. In addition, the judge expressed his belief that the sentence would deter other would-be criminals and protect society from petitioner, who was fully capable of continuing his criminal activities and who had no reasonable chance of rehabilitation. *Id.* at 765-767. Finally, as the district court pointed out (*id.* at 769), petitioner will be eligible for parole after serving just one-third of his sentence. Pet. App. 27a.

[8] Similarly, no appearance of partiality arose at sentencing as a result of the district judge's reference to petitioner's intimidation and financial seduction of merchants (see note 7, *supra*). For one thing, as the court of appeals found (Pet. App. 8a), it is far from clear that the judge's reference to "merchants" embraced London's Dairy. In any event, the judge's comment did not give rise to an appearance of partiality, because his connection with London's Dairy was quite attenuated.

[9] There is no reason to hold this petition pending the Court's disposition of *Liteky* v. *United States*, No. 92-6921 (argued Nov. 3, 1993). The question presented in *Liteky* is whether a motion to recuse under 28 U.S.C. 455(a) may be based upon allegations that a judge has developed a bias as a result of presiding over judicial proceedings. Petitioner's motion to recuse was based entirely on

2. Petitioner also contends (Pet. 17-19) that the court of appeals erred in holding that he failed to preserve his challenge to the sufficiency of the evidence on Counts 1 and 2. That contention does not merit review by this Court.

Defense counsel explicitly circumscribed his "Rule 29 motion" on Counts 1 and 2 by informing the district court that "[s]ubstantively we have no Rule 29 motion" as to those counts (Pet. App. 52a-53a) and by emphasizing that his statute-of-limitations claim with respect to those counts turned on his sufficiency-of-the-evidence claim regarding Count 6. See *id.* at 53a ("I think the statute of limitations argument in [*sic*] that obstruction of the IRS audit argument are interrelated."); *id.* at 54a ("So I think Rule 29 should be granted with regard to the obstruction count, Count 6. *That being the case*, then the government loses their underpinnings for extending the statute of limitations [on Counts 1 and 2]."") (emphasis added)). Thus, in the district court, petitioner based his claim regarding Counts 1 and 2 entirely on his sufficiency-of-the-evidence challenge to Count 6.

On appeal, however, petitioner failed to challenge the sufficiency of the evidence on Count 6 (Pet. App. 30a), and his only argument with respect to the sufficiency of the evidence on Counts 1 and 2 was that the government had failed to prove any affirmative acts of evasion within the statute of limitations. Pet. C.A. Br. 41-42; Pet. C.A. Reply Br. 18-20. The court of appeals rejected that argument on the merits, finding that petitioner attempted to evade his 1982 and 1983 taxes in November 1985, well within the limitations period. The court explained:

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allegations of extrajudicial bias, and thus *Liteky* will shed no light on the proper disposition of this case.

> [T]the statute of limitations for income tax evasion alleged in Counts 1 and 2 in this case did not begin to run *until the last affirmative evasive acts occurring sometime in November of 1985.* * * * [I]t is these evasive acts, occurring within six years of the superseding indictment, which form the basis of the crimes alleged in Counts 1 and 2 of the superseding indictment. * * * [H]ad it not been for [petitioner's] evasive acts in 1985, the IRS would very likely have discovered [petitioner's] income tax fraud occurring in 1982 and 1983.

Pet. App. 23a; see also *id.* at 22a ("in this case, [petitioner's] evasive acts in 1985 prevented the IRS from learning about [petitioner's] income tax fraud occurring in 1982 and 1983"). Thus, contrary to petitioner's contention (Pet. 19 n.3), the court of appeals did not refuse to address his claim that none of his acts of evasion occurred within the limitations period.

To be sure, the court of appeals went on to suggest that petitioner failed to preserve any more general challenge to the sufficiency of the evidence on Counts 1 and 2. Pet. App. 28a-33a. But petitioner does not seek to make any such general challenge to the sufficiency of the evidence in this Court, nor did he make such a claim below. Rather, petitioner's only claim is that the evidence was insufficient to support a finding that his acts of evasion occurred within the limitations period. Under those circumstances, the court of appeals acted properly in concluding that petitioner had expressly disavowed any more general challenge to the sufficiency of the evidence on Counts 1 and 2. The court was not required to consider arguments that were disavowed in the district court and not pursued on appeal.

In any event, as the court of appeals noted (Pet. App. 31a), a motion under Fed. R. Crim. P. 29 that is limited to specific grounds fails to preserve all other grounds not raised, because "[t]he specification of grounds * * * is an indication that counsel has evaluated the record and has these particular reasons for his motion." *United States* v. *Rivera*, 388 F.2d 545, 548 (2d Cir.), cert. denied, 392 U.S. 937 (1968).[10] Contrary to petitioner's contention, that conclusion does not conflict with the Second Circuit's decision in *United States* v. *Gjurashaj*, 706 F.2d 395 (1983). *Gjurashaj* reaffirms the general proposition that a defendant making a general motion for a judgment of acquittal need not specify the precise grounds for the motion (*id.* at 399), but it does not address the question whether a Rule 29 motion that is limited to specific grounds fails to preserve other grounds not raised.

Similarly, the decision below does not conflict with *United States* v. *Jones*, 174 F.2d 746 (7th Cir. 1949). In *Jones*, the court held that "the defendant is not required to go over the proof for the benefit of the Government or the court, *in the absence of some request for more spe-*

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[10] *United States* v. *McDonough*, 603 F.2d 19 (7th Cir. 1979), is not to the contrary. *McDonough* holds only that a specific Rule 29 motion that ignores the issue of venue fails to preserve that issue. 603 F.2d at 22. It does not purport to resolve the question whether other types of sufficiency claims can be forfeited in the same manner. In particular, *McDonough* does not address the effect of a defendant's failure to assert a claim based on the statute of limitations, which, like venue, is not an element of the offense (see *United States* v. *Walsh*, 700 F.2d 846, 856 (2d Cir.), cert. denied, 464 U.S. 825 (1983)), and can be waived. See, *e.g.*, *Acevedo-Ramos* v. *United States*, 961 F.2d 305, 307 (1st Cir.), cert. denied, 113 S. Ct. 299 (1992). But see *United States* v. *York*, 888 F.2d 1050, 1057 n.10 (5th Cir. 1989).

cific objection." 174 F.2d at 748 (emphasis added). The Seventh Circuit has made clear that *Jones* is limited to the circumstances of that case: "we see no reason for extending [*Jones*] beyond its own narrow factual predicate. * * * [T]he failure to urge the matter when asked to be specific forecloses, in our opinion, raising the question on this appeal." *United States* v. *McDonough*, 603 F.2d 19, 22 (7th Cir. 1979). In this case, the district court did ask defense counsel for a more detailed explanation of his Rule 29 motion, at which point defense counsel disclaimed any "[s]ubstantive[]" motion and based his entire argument on the asserted insufficiency of the evidence on Count 6. Pet. App. 53a-54a. Thus, there is no circuit conflict, and further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LORETTA C. ARGRETT
Assistant Attorney General

ROBERT E. LINDSAY
ALAN HECHTKOPF
YOEL TOBIN
Attorneys

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